

No Appeasement

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Maximilian Steinbeis Fr 17 Jan
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If you control everything, you are blamed for everything. I suppose this can become a bit of a pain for an authoritarian president eventually. For a while you may get away with making a paternally stern face in front of a camera and scolding governors and MPs for their faulty ways. But eventually people do realise that it is you who chooses and controls them, and no one else. And if it turns out you actually don't know and control everything (which of course you don't) and your minions actually do business on their own account most of the time, then things really get bad, then you look weak, which you certainly can't afford. Spreading fear and lies helps for a while, but not forever. How did Silvia von Steinsdorff put it so beautifully a while ago? "It's not easy being a good dictator."

I know as little as anyone else about what the Russian President Vladimir Putin is really up to with his announced constitutional reform. What we do know is that Parliament is to be formally strengthened, the office of president (which Putin must relinquish in 2024 according to the constitution) weakened accordingly and on top of that strictly limited to two terms of office. Offices and mandates are to be tied to Russian and only Russian citizenship: no dual citizenship for MPs, governors, judges nor for the president, who on top of that must have lived in Russia for 25 years. This probably aims at shutting the cosmopolitan opposition out, but it would also affect the corrupt elites who have bought EU passports in Malta and Cyprus and real estate in Berlin and London for themselves in case life gets too uncomfortable in holy mother Russia.

Many now suspect that an obscure institution called the "State Council" could be the key to Putin's idea of Russia's constitutional future after 2024. Chairman of the State Council with vague powers, no term limits and factually unbridled power, also and especially over the formal holders of state offices in the government – that has its charms, I suppose. And if something goes wrong, there is always someone other than yourself whom you can have stepping down with great fanfare.

As far as human rights are concerned, at any rate, any illusion quickly evaporates when you see what Putin has in mind for the primacy of international law over Russian law (Article 15(4) of the Constitution). In future, this order is to be reversed and national law is to take precedence over international law. In this way, the fact that Russia has for years spat on its obligations under the European Convention on Human Rights would now be smoothed out constitutionally. Russia has by far the worst record before the ECtHR, even before Turkey. The Council of Europe keeps appeasing Russia to make sure it at least pays its bills. We will regret that.

Poland

Poland is a country where the institutional setup in the constitution and the actual structure of power in the state have been rather separate things since 2015. From looking up who wields which powers in the *Rzeczpospolita Polska* in the constitution, you'd never guess that the actual kingpin is a little old man named Jarosław Kaczyński, ordinary member of the Sejm and in his private capacity the chairman of the PiS party.

The big news of this week is that in the ongoing conflict with Poland, Europe is not going for appeasement after all, or so it seems. The EU Commission has applied to the European Court of Justice for a temporary injunction to put an end to the activities of the so-called Disciplinary Chamber at the Supreme Court. This is huge.

This chamber, staffed by people hand-picked by the National Council of the Judiciary which is itself remote-controlled by the Ministry of Justice, is the PiS government's most important tool for bringing the independent judiciary under its thumb. In November, the European Court of Justice ruled that the courts must have a sufficient degree of independence in order to judge in accordance with EU law. And the Polish Supreme Court had subsequently ruled that the disciplinary chamber does not meet this standard.

The PiS government is now trying to solve the problem by brute force, with a "muzzle law" that forbids all Polish judges to do what EU law requires them to do – namely to set aside the rulings of the disciplinary chamber and other judges appointed by the PiS-controlled Judicial Council as incompatible with EU law. Whoever does so will encounter the full force of disciplinary law up to removal from office.

The Venice Commission of the Council of Europe has published an expert opinion on this yesterday: The "muzzle law", according to seven experts from as many countries, restricts the possibility of making the institutional independence of the court an issue at all in the judicial process. This is incompatible with the right to an independent and impartial court under Article 6 ECHR. Moreover, the law aims at neutralising the case law of the European Court of Justice, which in November had expressly emphasised the duty of the referring court to problematise the independence of the disciplinary chamber. According to the Venice Commission, the "muzzle law" would "signify an open defiance of the primacy of EU law and the status granted to the CJEU by Article 19(1) of the Treaty."

Moreover, according to the Venice Commission, the law violates the freedom of speech and association of Polish judges, concentrates even more power at the Ministry of Justice and deprives citizens of their right to a lawful judge because it may lead to abusive redistribution of cases to "loyal" judges. If the legislator wants to avoid legal chaos, he has to get to the root of the problem and take back all the atrocities he has inflicted on judiciary since 2017 – most of all the subjugation of the National Council of the Judiciary and the two new "super-chambers" at the Supreme Court.

None of that will happen of course, which is why the next escalation stage must necessarily follow as soon as the "muzzle law" comes into force: another infringement

procedure before the ECJ, including an injunction to leave it unapplied until the arrival of the judgement on pain of substantial penalties. To apply for such an injunction is the responsibility of the EU Commission.

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Meanwhile the Commission has already done so with regard to the activities of the Disciplinary Board. I find this particularly good news because it shows that the new Commission is more reliable after all than many had thought. Its President Ursula von der Leyen had so far shown little inclination to invest much political capital needed for her "Green Deal" in a messy and risky rule-of-law dispute with Poland. It seems she does now, ultimately. Which is really great. Our former Minister of Justice, current EP Vice-President Katarina Barley, has played a decisive role in this, I hear. My warmest thanks to her and to other people I know personally who have worked hard to achieve this!

Last Monday, it was four years since the Commission first activated the "Rule of Law Framework" in the Polish case. As they did a year ago, LAURENT PECH and PATRYK WACHOWIEC are taking the anniversary as an opportunity to take stock. In a [two-part blog post](#) they list what has been achieved and what has not. If you are interested in a thorough and accessible overview of this complex conflict in which so much is at stake for the entire EU, look no further.

Add to this the fact that a) the European Parliament decided yesterday by a huge majority to demand further measures, including financial ones, in the context of the Article 7 proceedings against Poland and Hungary, and b) the days of Viktor Orbán and his Fidesz membership of the European People's Party seem to be numbered after all. This has not been such a bad week for the fight for the rule of law, has it?

Spain

At the other end of the continent, however, another conflict with potentially highly corrosive effects on the rule of law is brewing, namely in Spain. Just before Christmas, the European Court of Justice ruled that Catalan separatist leaders elected to the European Parliament enjoy immunity. However, the Spanish Supreme Court did not conclude from this that it should let MEP Oriol Junqueras, imprisoned in Spain, travel to Strasbourg.

According to [PETER VAN ELSUWEGE](#), the Spanish Supreme Court is ignoring the text and spirit of the ECJ ruling. The decision from Madrid strains the relationship between EU and Spanish law and could cause infringement proceedings against Spain.

[IGNASI GUARDANS](#) takes a decidedly different position: The Spanish Supreme Court did everything right. At the time of the referral to the ECJ Junqueras had not yet been finally convicted and was presumed innocent. With the final ruling, however, he had lost his eligibility for election to the EU Parliament and thereby his immunity.

For [JOAQUÍN URÍAS](#), on the other hand, the Junqueras case reveals that there is something wrong with the Spanish justice system in general. The growing perception that the impartiality of Spanish judges cannot be relied upon is not only based on the political conflict in Catalonia, but also on the regulation of access to the judiciary and the concrete behaviour of many Spanish judges, including on social media.

Urías does not mince his words in his criticism (nor does Guardans in his, for that matter). After the fugitive Catalan separatist leader Carles Puigdemont recommended Urías' article to his 800,000 Twitter followers, the inevitable happened: tons of love from Catalan nationalists crashed down on us, and an according amount of venom from Spanish nationalists.

They can both go to hell, for all I care. We on Verfassungsblog will call out both Puigdemont and Junqueras and tutti quanti for their un- and anti-constitutional policies *and* Spanish post-Franco nationalist conservatism and its offshoots in the judiciary for their snarling authoritarianism at the same time, if need be. Our job is to keep an open debate and an open mind, along with the beleaguered majority throughout Spain who, I presume, refuse to align themselves blindly with one side in fighting the other. This is not about appeasement, mind you. I like a good fight as much as anyone. But in this one, I'd rather take on both.

India

One apex court of particular concern at the moment is the Indian Supreme Court. The largest democracy in the world is ruled by Hindu nationalists against whose methods and intentions some European autocrats look downright pale. Half a year ago, the government cancelled the constitutional special status of the predominantly Muslim region and, in order to be able to suppress the expected protests undisturbed and unobserved, switched off the entire Internet in Kashmir.

The Supreme Court delivered its verdict on whether this was legal last week. ADEEL HUSSAIN describes in detail the historical and legal background of the conflict and is deeply disappointed with this overly cautious judgement.

USA, Iran

Speaking of appeasement: The debate whether the killing of Iranian General Qassem Soleimani by a US drone was justified under international law went on this week. Some find reasons to believe it was, also in German media, which now challenges TABASOM DJOURABI-ASADABADI, MEHRNUSCH ANSSARI and JAMAL EL-ZEIN to contradict: The fact that the USA has not substantiated how exactly they justify the attack does not make the violation of the ban on violence any less illegal – on the contrary.

Intelligence services

The world out there is evil and dangerous, and to keep the German executive informed and warned and prepared and us Germans inside safe and cosy is the task of the *Bundesnachrichtendienst* (BND). This outside/inside distinction is also reflected in the limitations to which the BND is subject: The surveillance of communications between

foreigners abroad is regulated only since 2016 in the wake of the Snowden affair, and only very loosely, too. The difference: foreigners abroad, unlike nationals, do not enjoy subjective German fundamental rights. Or do they?

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Am Lehrstuhl für Öffentliches Recht, Rechtsphilosophie und Rechtsökonomik (Prof. Dr. Stefan Magen) der Juristischen Fakultät der Ruhr-Universität Bochum ist zum 1. Mai 2020 eine halbe Stelle (19,92 Std.) eines wiss. Mitarbeiters (m,w,d) (TVL-E 13) zu besetzen.

Zum Aufgabengebiet gehören die Mitwirkung bei Forschungen im öffentlichen Recht und/oder in der Rechtsphilosophie und Rechtsökonomik, bei der Lehre und der Organisation des Lehrstuhls sowie eigene Lehr- und Forschungstätigkeit. Die Stelle ist befristet auf 3 Jahre. Details [hier](#).

This question was up for discussion at a hearing before the Federal Constitutional Court this week. I went to Karlsruhe to watch it, and my report can be found [here](#). The verdict will not arrive until in a few months' time, but this much can already be said: the court will not simply leave this internal/external distinction standing. It seems to me to be an illusion anyway, given the close international cooperation between the intelligence services: For all but one of them, we are all foreigners everywhere, respectively. In a borderless world of intelligence cooperation, fundamental rights cannot simply end at territorial borders.

What was also interesting about the trial was that the Federal Constitutional Court invited an expert from the UK, Tom Hickman from the UCL, to learn more about the British intelligence control system. The fact that the Karlsruhe judges take into account other constitutional systems and solutions at all seems laudable from a comparative constitutionalism perspective. Whether the legislator finds it funny if Karlsruhe now possibly recommends the British model along the lines of: look, they can do it, so why can't you? – well, that's a different matter.

Germany, USA

Burning the black-red-gold federal flag in Germany is punishable by law. The vast majority of Germans wouldn't give a damn if someone did, though. In the USA this is completely different, the stars and stripes are serious business – but according to the US Supreme Court, burning the flag is covered by the freedom of speech.

Now the German legislator goes even one step further and intends to make burning also foreign flags (that is: Israel's) a punishable offence. JUSTIN COLLINGS, one of the best experts on German constitutional law in the USA, finds that rather grotesque: Admittedly, German constitutional doctrine is a lot less strict than American with regard to the protection of free speech. But if the Federal Constitutional Court has allowed restrictions in such cases in the past, it has been generally in the context of German *Vergangenheitspolitik* – an argument that, in terms of burning foreign flags, may apply to Israel, but certainly to none other. "In an American setting, (the proposed law) would be constitutionally dead on arrival. But even by the laxer terms of German jurisprudence, the proposal to protect all the flags could be upheld only by drastically – and I think disastrously – transforming German law on the freedom of speech."

Germany

The German *Bundestag* has voted against the so-called objection solution for organ donation. STEFAN HUSTER has already shed light on the constitutional aspects of this some time ago.

The "climate package" of the Union-SPD coalition contains an emissions trading system which, according to several legal experts, raises concerns about its constitutionality. The crucial question is whether it qualifies as a levy (the state gives something in return) or a tax (it does not). RIKE KRÄMER-HOPPE argues that it is not as clear as one would think how the Federal Constitutional Court sees the matter, and sees good arguments for it being an unproblematic non-tax levy.

In the federal capital Berlin, the controversial law on the rent freeze is to come into force soon. And there is no shortage of legal experts either (among them the inevitable Hans-Jürgen Papier, of course) who come up with reasons why this is all unconstitutional. One of them: the effective date for the rent freeze is to be 18 June 2019, i.e. a date before the law even comes into force. Is this a prohibited retroactive intervention in a past situation? Actually not, NORA WIENFORT believes.

Last week, the Berlin Administrative Court had rejected the complaint of the far-right AfD party against a hefty penalty for illegal party donations. An advertising campaign had been donated by a Swiss entrepreneur to party leader Jörg Meuthen which was in breach of party finance law. ALEXANDER HOBUSCH analyses the case and comes to the conclusion that the AfD indeed has to pay.

Italy

Italy had some bad experiences with major constitutional reforms recently, which is why

the latest attempt is comparatively small-fry: no fundamental change to the parliamentary system, as Matteo Renzi envisioned and failed to achieve at the cost of his office as Prime Minister, but only a reduction in the size of the parliament and an adjustment to the distribution of seats in the second chamber. There will still be a referendum because of the current shaky majority in parliament, but, as EDOARDO D'ALFONSO MASARIÉ points out, this time it has a good chance of success.

So much for the constitutional news and events of this week. At this point, a very warm thank you to all those who responded to our appeal from last week to support us on Steady or with a donation (paypal@verfassungsblog.de or IBAN DE41 1001 0010 0923 7441 03). To all those who haven't yet: please be so kind! We need the money.

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